No. 85-2050

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JOHNSON & JOHNSON PRODUCTS, INC.,

Petitioner,

—v.—

LYNETTE WEST,

Respondent.

REPLY BRIEF OF JOHNSON & JOHNSON PRODUCTS, INC. IN SUPPORT OF ITS PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

DAVID F. DOBBINS
PATTERSON, BELKNAP, WEBB & TYLER
30 Rockefeller Plaza
New York, New York 10112
(212) 541-4000

Counsel for Petitioner Johnson & Johnson Products, Inc.

Of Counsel:

ROBERT E. CHRISTIANSEN
One Johnson & Johnson Plaza
New Brunswick, New Jersey 08933
(201) 524-0400

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I. PLAINTIFF DOES NOT DISPUTE THAT PUNITIVE DAMAGES WERE IMPOSED ON JOHNSON & JOHNSON PRODUCTS, INC. EVEN THOUGH IT HAD NO KNOWLEDGE OF THE RISK OF TOXIC SHOCK SYNDROME AND WAS INCAPABLE OF DISCOVERING THAT DISEASE BEFORE PLAINTIFF CONTRACTED IT

The concessions, both explicit and implicit, in Ms. West's brief underscore the constitutional infirmity of this punitive damage award and the need for Supreme Court guidance in this important area of the law. Ms. West urges that the Petition raises a narrow factual issue not likely to be presented again. On the contrary, plaintiffs are seeking to impose punitive sanctions on manufacturers for unforeseeable consequences of the ordinary use of mass-marketed products with increasing

frequency, and the need for guidance from this Court is accordingly urgent.

Ms. West concedes no one knew of tampon-associated toxic shock syndrome (TSS) until the federal Center for Disease Control (CDC) discovered it in June 1980 through retrospective analysis of all cases of TSS and *all* brands of tampons (p. 4).[1] That was five months after her own February 1980 case of what was later claimed to be TSS. Ms. West's brief also makes clear that Johnson & Johnson Products, Inc. ("JJP") could not have discovered tampon-associated TSS prior to February 1980 when she incurred it. She does not contest JJP's detailed discussion of the record evidence (JJP's Petition, pp. 5-8) showing that, even nationwide, not enough cases of TSS existed until the late Spring of 1980 to permit correlation of that syndrome to tampon use. Nor does she dispute that JJP had no reports of that disease and that only a national health organization like the CDC could collect enough of the rare TSS cases to link them, through case-control analysis, to tampon use as the common risk factor (JJP's Petition, p. 6).

Ms. West, in short, makes no attempt to defend the California Court of Appeal's erroneous suggestion that evidence existed showing JJP could have discovered TSS. JJP's explanation (JJP's Petition, pp. 6-8) of that court's misreading of the trial record on that point is not disputed by Ms. West. She also leaves unchallenged JJP's point that, even assuming, *arguendo* only, the discoverability of TSS, the failure to make that discovery prior to February 1980 could not possibly be viewed as negligent.

Rather than defending the actual basis for the punitive award—failure to acquire knowledge of a universally unknown and then undiscoverable product risk—Ms. West (1) erroneously claims, for the first time ever in this case, that TSS is a "vaginal infection," and then (2) seeks deceptively to substitute JJP's supposed knowledge of the association between tampons

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1 Unless otherwise indicated, the page references are to Plaintiff-Respondent's Brief in Opposition to the Petition for Certiorari.

and vaginal infections for the unproven and unprovable hypothesis that JJP knew its tampons were associated with TSS.

TSS, however, is not a "vaginal infection." It is a systemic septicemia fundamentally different in scope and degree from the common gynecological infections which occasionally occur in connection with menses no matter what type of sanitary protection is used. R.T. 918-19, 94, 1077, 1088-90, 1288. Ms. West's case, like other TSS cases, presented no symptoms of vaginal infection, and there is nothing in her hospital chart suggesting any such malady. R.T. 86, 877.[2] The CDC definition of TSS makes no reference to vaginal infection, but rather lists the following symptoms: high fever; low blood pressure; vomiting; diarrhea; kidney impairment; liver impairment; muscle pain; and low platelet count. R.T. 414-20.

Equally untenable is Ms. West's effort to equate knowledge of the association of tampons and vaginal infections to knowledge of TSS. Common gynecological infections are more prevalent during menstruation, and thus are seen frequently in menstruating women no matter what type of sanitary protection they use. The proof at trial was that the same gynecological complaints reported to JJP by tampon users were also reported to it by users of its sanitary napkins. R.T. 942-43, 1016. There was no evidence of an increased frequency of those reports in tampon users versus napkin users. R.T. 1016. Likewise there was no proof that the "association" of such common complaints with menstruation, and hence with sanitary protection products, reflected a cause and effect relationship. No one at trial, including plaintiff's experts, suggested these complaints were predictive of TSS. This scientifically indisputable fact is also reflected in the TSS case law. Thus in *Wolf v. Procter & Gamble Co.*, 555 F. Supp. 613, 622 (D.N.J. 1982), the trial court excluded evidence of precisely these same types of complaints from tampon users as having no evidentiary significance in a TSS case.

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2 An infection in the vagina is hypothesized by Ms. West's expert Dr. Dan to precede TSS. R.T. 432.

Knowledge that women who use tampons occasionally develop minor vaginal infections, which are fundamentally different from the phenomenon of TSS, cannot support a punitive award in this case consistent with the Due Process Clause. As discussed in JJP's Petition (pp. 21-22), without rebuttal from Ms. West, one cannot constitutionally divorce the conduct which is punished by an award of punitive damages from the conduct which results in a plaintiff's injury. To do so gives the jury a license to exact sanctions from unpopular defendants and turns civil actions into freewheeling inquisitions into extraneous behavior.

Ms. West also does not dispute JJP's point (JJP's Petition, p. 4) that inherent in any testing is a "failure" to do more testing. Thus a "failure to test" cannot serve as the basis for a punitive award absent, at minimum, some showing that the further testing hypothesized would have discovered, and thus avoided, plaintiff's injury.[3] Recognition that more testing would not have yielded a warning on TSS motivated Ms. West at trial to drop her negligence claim encompassing both failure to warn and failure to test. The Court of Appeal itself noted that the negligence theory "inevitably [would] result in a nonsuit or a defense verdict." 220 Cal. Rptr. at 450 (A-53).

Ms. West also quotes one of her experts to the effect that tampons "should be properly made with natural materials such as cotton," and not "super absorbents" (p. 14), but ignores the fact o.b. tampons are made with natural materials, namely cotton and rayon, a natural fiber made from wood pulp. R.T. 1159-61; 1181; 1302.[4] In addition, Ms. West's arguments seek

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3 Ms. West herself discusses some of JJP's testing at pages 2-3 of her brief. Moreover, o.b. tampons were first put on the market in Europe in the 1950's, so that JJP had the best possible experience before putting o.b. tampons on the market in the United States, in that they had been used by millions of women in Europe before they were used in the United States by anyone. 220 Cal. Rptr. at 443, 444 (A-26); R.T. 1148, 1153, 1183, 1246, 1257, 1297.

4 Unlike the new synthetics of which Rely and other withdrawn tampon brands were composed, o.b.'s cotton-rayon blend had been used for years for wound dressings prior to its adaptation for tampons (R.T. 1302), as Dr. Tierno conceded (R.T. 667).

to obscure the fact that the o.b. tampons that continue to be marketed to this day are identical in all respects, including absorbency, to those used by her in 1980. Her expert Dr. Tierno himself stated that o.b. tampons should not be withdrawn from the market (R.T. 660, 679), and her other expert Dr. Dan agreed (R.T. 500-501). Ms. West asserts conclusorily that JJP "could have avoided" her injury (p. 14). But she cites no test or other action on JJP's part which would have resulted in identification of the TSS risk.

Ms. West's brief in response to the Petition thus confirms and reinforces the simplicity of the constitutional issues presented for review: where the defendant did not know of the risk of the plaintiff's injury and could not have discovered that risk, is it nonetheless constitutionally permissible to impose punitive damages on that defendant?

II. PLAINTIFF'S ARGUMENT THAT THE CONSTITUTIONAL ISSUES PRESENTED BY THE PETITION HAVE BEEN SETTLED BY THE COURT'S PRIOR RULINGS IS INACCURATE

Ms. West mischaracterizes JJP's position on the punitive damage culpability threshold required by the Due Process Clause and, having mischaracterized it, asserts it has been disposed of by *Smith v. Wade*, 461 U.S. 30 (1983). But JJP's position is not, as Ms. West would have it, that due process requires "actual ill will, spite, or intent to injure" (p. 10). The constitutional minimum, as Ms. West herself concedes (p. 10), is a subjective consciousness of the risk of the harm the plaintiff suffers. That is clearly indicated by the *Wade* majority. It is unfair, and contrary to the most basic notion of what is just, to punish someone who does not know and has no reason to know that he is exposing plaintiff to a risk of harm. Ms. West makes no attempt to dispute that position.

Ms. West also ignores a critical point which gives particular force to JJP's petition. Liability in this case for compensatory damages was predicated on the consumer expectation test. That "test," which permits imposition of liability on a fault-

free basis, provides no rational guide for conduct. In *Wade*, on the other hand, the compensatory liability standard offered real guidance for the conduct of the defendant prison guards, thus eliminating any "need for exceptional clarity in the standard for punitive damages." 461 U.S. at 50. Plaintiff concedes by her silence JJP's point that the absence of any conduct guidance from the compensatory liability "standard" in this case puts enormous stress on the need for clear, articulable, predictable punitive damage standards. Those are missing here.

III. THE COURT HAS JURISDICTION OF THE ISSUES PRESENTED BY THE PETITION FOR CERTIORARI

Ms. West does not dispute that JJP consistently objected to the fundamental unfairness of the punitive damage award. JJP's Petition, pp. 11-12. But she contends that because those objections were not framed in constitutional terms until rehearing before the Court of Appeal, this Court has no jurisdiction to consider them. That argument is invalid. In the California courts Ms. West did not argue the empty standard of punitive damage liability adopted by the Court of Appeal. It was formulated for the first time by that Court. JJP challenged the constitutional violation inherent in the Court of Appeal's elimination of the "knowledge" requirement as soon as it occurred. In such circumstances "raising the federal question for the first time in the petition for rehearing is timely even though the state court says nothing in denying the petition." A. Stern, E. Gressman, S. Shapiro, *Supreme Court Practice*, p. 156 (6th ed. 1986); *Brinkerhoff-Faris Trust Co. v. Hill*, 281 U.S. 673, 677-78 (1930).[5]

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5 *See also Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 85-86 n.9 (1980) ("this Court has held federal claims to have been adequately presented even though not raised in lower state courts when the highest state court renders an unexpected interpretation of state law or reverses its prior interpretation"); *Estate of Wilson v. Aiken Industries, Inc.*, 439 U.S. 877, 878-79 (1978) (Blackmun, J., concurring in denial of *cert.*) (Court has jurisdiction "whenever the federal issue arose from an unanticipated ruling of the state court, the petition for rehearing presented the first opportunity to raise it, and that opportunity was seized"); *Great Northern Railway Co. v.*

The Court of Appeal's decision in this case represented a departure from the mainstream of California punitive damage law. California procedure required JJP to seek rehearing to bring the constitutional error inherent in that departure to the Court of Appeal's attention. 9 Witkin, *California Procedure, Appeal* § 683 (1985) (rehearing petitions are allowed for "the purpose of correcting any error which the court may have made in its opinion"). Until this case, California authority held that before the issue of punitive damages could be submitted to the jury:

> "the evidence must show that the defendant (1) *knew* of the (2) *probable* injurious consequences of his conduct and (3) *deliberately* failed to avoid them." (Emphasis in original).

Woolstrum v. Mailloux, 141 Cal. App. 3d Supp. 1, 5, 190 Cal. Rptr. 729, 732 (Super. 1983), citing *Hasson v. Ford Motor Co.*, 32 Cal. 3d 388, 185 Cal. Rptr. 654 (1982), *cert. dismissed*, 459 U.S. 1190 (1983), and *G.D. Searle & Co. v. Superior Court*, 49 Cal. App. 3d 22, 122 Cal. Rptr. 218 (3d Dist. 1975). Knowledge of the risk of the harm to plaintiff was an essential component of punitive damage liability. *See, e.g., Vossler v. Richards Manufacturing Co.*, 143 Cal. App. 3d 952, 956, 192 Cal. Rptr. 219 (5th Dist. 1983) (medical product's manufacturer knew of precise risk from uncorrected defect); *Hasson v. Ford Motor Co., supra* (Ford knew of precise danger from brake fluid boil); *Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (4th Dist. 1981) (Ford knew of danger from gas-tank explosion in slow speed rear-end collisions); *Nolin v. National Convenience Stores, Inc.*, 95 Cal. App. 3d 279, 157 Cal. Rptr. 32 (2d Dist. 1979) (defendant had been specifically advised of dangerous slippery condition from gas pump leakage).

Sunburst Oil & Refining Co., 287 U.S. 358, 367 (1932) (rehearing petition preserves the issue "where the grounds of the decision supply a new and unexpected basis for a claim by the defeated party of the denial of a federal right").

Perhaps the most instructive case on the prior status of California punitive damage law was *G.D. Searle v. Superior Court*, *supra*, 49 Cal. App. 3d at 32, where the Court of Appeal upheld the dismissal of a demand for punitive damages in a failure to warn medical products case, holding:

> The complaint does not charge Searle with knowledge of the dangerous potential of its product, but only with awareness that unspecified products of this "type" might cause injury.

That case was particularly significant in interpreting the California punitive damage statute, Civil Code § 3294, because that statute was amended in 1980 to incorporate more clearly the culpability standard described in the *G.D. Searle* case.[6]

The Court of Appeal's abandonment in this case of the punitive damage requirement of knowledge of the risk of the harm to plaintiff created a *de novo* issue. The law before this decision was that even recklessness was insufficient for punitive damages; culpable knowledge was required. "The central spirit of the exemplary damage statute, the demand for evil motive, is violated by an award founded upon recklessness alone." *G.D. Searle & Co. v. Superior Court*, *supra*, 49 Cal. App. 3d at 32. The elimination of the knowledge requirement, and the decision to found punitive damages on conduct—the failure to discover a universally unknown product danger—which was not even negligent, could only have been addressed on rehearing.

Ms. West never argued that knowledge was unnecessary under the California punitive damage statute, nor did she ever rely on the one or two cases which arguably relaxed the mainstream rule. *See* JJP's Petition, p. 20. Instead she claimed, erroneously, that the requisite knowledge was present in this case. Moreover, in opposing JJP's Petition for Review by the California Supreme Court, plaintiff never suggested that the constitutional issues were not timely raised.

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6 See letter of 9/2/80 from Senator Maddy to Governor Brown enclosing the bill.

This case, in short, presents exactly the situation contemplated in *Brinkerhoff-Faris Trust Co.*, *supra*, and the other cases cited above at p. 6, n.5. JJP was not required to anticipate the Court of Appeal's abandonment of settled punitive damage law. It thus timely brought to that Court's attention in its rehearing petition the constitutional error thereby created, and thereafter presented the same point to the California Supreme Court in the Petition for Review.

CONCLUSION

For the reasons set forth above and in JJP's Petition, the Writ of Certiorari should issue.

Respectfully submitted,

/s/ DAVID F. DOBBINS
PATTERSON, BELKNAP, WEBB & TYLER
30 Rockefeller Plaza
New York, New York 10112
(212) 541-4000

Counsel for Petitioner
Johnson & Johnson Products, Inc.

Of Counsel:
ROBERT E. CHRISTIANSEN